

**STATEMENT
of
THE MILITARY COALITION**

**on the
Uniformed Services Employment and
Reemployment Rights Act**

**Before the
Subcommittee on Veterans' Benefits
House Committee on Veterans' Affairs**

July 24, 2003

Presented by

**Colonel Robert F. Norton, USA-Ret.
Co-Chairman, Veterans' Committee
The Military Coalition**

Biography of Robert F. Norton, COL, USA (Ret.)
Deputy Director, Government Relations, MOAA
Co-Chair, Veterans' Committee, The Military Coalition

A native New Yorker, Bob Norton was born in Brooklyn and raised on Long Island. Following graduation from college in 1966, he enlisted in the U.S. Army as a private, completed officer candidate school, and was commissioned a second lieutenant of infantry in August 1967. He served a tour in South Vietnam (1968-1969) as a civil affairs platoon leader supporting the 196th Infantry Brigade in I Corps. He transferred to the U.S. Army Reserve in 1969 and pursued a teaching career at the secondary school level. He joined the 356th Civil Affairs Brigade (USAR), Bronx, NY and served in various staff positions from 1972-1978.

Colonel Norton volunteered for active duty in 1978 and was among the first group of USAR officers to affiliate with the "active Guard and Reserve" (AGR) program on full-time active duty. He specialized in manpower, personnel, and quality-of-life programs for the Army's reserve forces. Assignments included the Office of the Deputy Chief of Staff for Personnel, Army Staff; advisor to the Asst. Secretary of the Army (Manpower & Reserve Affairs); and personnel policy and plans officer for the Chief, Army Reserve.

Colonel Norton served two tours in the Office of the Secretary of Defense (OSD). He was responsible for implementing the Reserve Montgomery GI Bill as a staff officer in Reserve Affairs, OSD. From 1989 –1994, he was the senior military assistant to the Assistant Secretary of Defense for Reserve Affairs, where he was responsible for advising the Asst. Secretary and coordinating a staff of over 90 military and civilian personnel. During this tour, Reserve Affairs oversaw the call-up of more than 250,000 National Guard and Reserve component troops for the Persian Gulf War. Colonel Norton completed his career as special assistant to the Principal Deputy Asst. Secretary of Defense, Special Operations / Low Intensity Conflict and retired in 1995.

In 1995, Colonel Norton joined Analytic Services, Inc. (ANSER), Arlington, VA as a senior operational planner supporting various clients including United Nations humanitarian organizations and the U.S. Air Force's counterproliferation office. He joined MOAA's national headquarters as Deputy Director of Government Relations in March 1997.

Colonel Norton holds a B.A. in philosophy from Niagara University (1966) and a Master of Science (Education) from Canisius College, Buffalo (1971). He is a graduate of the U.S. Army Command and General Staff College, the U.S. Army War College, and Harvard University's Senior Officials in National Security course at the Kennedy School of Government.

Colonel Norton's military awards include the Legion of Merit, Defense Superior Service Medal, Bronze Star, Vietnam Service Medal, Armed Forces Reserve Medal, Army Staff Identification Badge and Office of the Secretary of Defense Identification Badge.

Colonel Norton is married to the former Colleen Krebs. The Nortons have two grown children and reside in Derwood, Maryland.

MISTER CHAIRMAN AND DISTINGUISHED MEMBERS OF THE COMMITTEE, on behalf of The Military Coalition, a consortium of nationally prominent uniformed services and veterans' organizations, I am grateful for this opportunity to express our views on issues concerning the Uniformed Services Employment and Reemployment Rights Act (USERRA). This testimony provides the collective views of the following military and veterans' organizations, which represent approximately 5.5 million current and former members of the seven uniformed services, plus their families and survivors.

- Air Force Association
- Air Force Sergeants Association
- Air Force Women Officers Associated
- American Logistics Association
- AMVETS (American Veterans)
- Army Aviation Association of America
- Association of Military Surgeons of the United States
- Association of the United States Army
- Chief Warrant Officer and Warrant Officer Association, U.S. Coast Guard
- Commissioned Officers Association of the U.S. Public Health Service, Inc.
- Enlisted Association of the National Guard of the United States
- Fleet Reserve Association
- Gold Star Wives of America, Inc.
- Jewish War Veterans of the United States of America
- Marine Corps League
- Marine Corps Reserve Officers Association
- Military Chaplains Association of the United States of America
- Military Officers Association of America
- Military Order of the Purple Heart
- National Association for Uniformed Services
- National Guard Association of the United States
- National Military Family Association
- National Order of Battlefield Commissions
- Naval Enlisted Reserve Association
- Naval Reserve Association
- Navy League of the United States
- Non Commissioned Officers Association
- Reserve Officers Association
- The Retired Enlisted Association
- The Society of Medical Consultants to the Armed Forces
- United Armed Forces Association
- United States Army Warrant Officers Association
- United States Coast Guard Chief Petty Officers Association
- Veterans of Foreign Wars
- Veterans' Widows International Network

The Military Coalition, Inc., does not receive any grants or contracts from the federal government.

Importance of USERRA

Our nation is undergoing the largest protracted mobilization of National Guard and Reserve forces since World War II. According to the Defense Department (DoD), since September 11, 2001, more than 292,000 members of the National Guard and Reserve forces have been mobilized on federal orders to support ongoing military operations in the nation's war on terror at home and abroad. 204,000 Guard and Reserve servicemembers remain on active duty and about 88,000 of the total number mobilized have been released from duty back to their hometown communities. Approximately 15,000 of the servicemembers who remain on active duty have received orders extending their service obligation to a total of 24 months active duty.

Given the size and unknown conclusion of these activations, the laws that protect the reemployment rights of our nation's citizen-soldiers cannot be over-emphasized.

Job One: Protect Reemployment Rights

Under the USERRA, Reemployment rights extend to persons who have been absent from a position of employment because of "service in the uniformed services." "Service in the uniformed services" means the performance of duty on a voluntary or involuntary basis in a uniformed service, including:

- Active duty
- Active duty for training
- Initial active duty for training
- Inactive duty training
- Full-time National Guard duty.
- Absence from work for an examination to determine a person's fitness for any of the above types of duty.
- Funeral honors duty performed by National Guard or reserve members.
- Duty performed by intermittent disaster response personnel for the Public Health Service, and approved training to prepare for such service (added by Pub. L. 107-188, June 2002). See Title 42, U.S. Code, section 300hh-11(e).

The "uniformed services" consist of the following:

- Army, Navy, Marine Corps, Air Force, or Coast Guard.
- Army National Guard or Air National Guard.
- Army Reserve, Naval Reserve, Marine Corps Reserve, Air Force

Reserve, or Coast Guard Reserve.

- Commissioned Corps of the Public Health Service.
- National Oceanic and Atmospheric Administration Corps of Commissioned Officers (NOAA Corps)
- Any other category of persons designated by the President in

time of war or emergency.

Improving USERRA and Its Implementation

The Military Coalition (TMC) is grateful to Congress for revising and improving employment and reemployment rights legislation under the Uniformed Services Employment and Reemployment Rights Act of 1994 following the first Persian Gulf War, and again in 1998.

A summary of implementation and policy issues that TMC believes can strengthen the USERRA follows.

- Escalator Principle and Merit Raise Problem. The “escalator” principle of the statute requires that each returning servicemember actually step back onto the seniority escalator at the point the person would have occupied if the person had remained continuously employed. The principle applies to pay increases and other benefits arising from seniority. The escalator principle appears to work as intended regarding fixed pay or pay scale increases that are based on published pay tables, such as those used by the federal government. However, the application of the principle to merit pay increases that are based on annual evaluations is less certain. For example, if a reservist employee is activated for 12 months and is told upon return to the workplace that the employer will not award a pay increase when one is based on performance evaluations of actual work performed. [The theory in such cases is that since the mobilized reservist performed no work for the employer during the activation, an evaluation would not be performed, and therefore a merit pay increase would not be awarded when the reservist returned to the workplace]. The Reserve Officers Association (ROA), a charter member of TMC, has received a number of inquiries from mobilized reservists regarding this issue.

TMC recommends that the Subcommittee strengthen the escalator principle to ensure that reemployed servicemembers are not denied merit pay increases based on the lack of a scheduled performance evaluation during military absence. We recommend, for example, that an average of two or three previous merit increases, if awarded, be used to set a reemployment pay increase.

- State Employees. [38 USC Sec. 4323] Because of a line of US Supreme Court cases interpreting the Eleventh Amendment of the Constitution as not allowing individual state employees to sue their state government employers, without the state waiving its sovereign immunity under various federal laws, Congress amended the USERRA in 1998 (P.L.105-368), and decreed that state employees may assert their USERRA rights against their state employers by having the US Department of Justice (DoJ) sue the State Governments on their behalf.

Going back nearly five years, there have been no reported cases where the DoJ or the US Attorneys have sued a state on behalf of a USERRA state employee complainant. This provision is seriously broken. State employees have no avenue to sue, because unlike Federal employees and private employees who may still hire private counsel as an alternative to a non-responsive “free” federal attorney, case law does not allow these individuals any remedy to sue individually to enforce the USERRA.

This issue has potentially serious consequences for potentially many hundreds and possibly thousands of returning Guard and Reserve servicemembers. The states can effectively abrogate the clear mandate of the USERRA. Down the road, reenlistment and retention programs for the National Guard and Reserve could be seriously eroded if the DoJ maintains its hands-off attitude to state-employee reemployment rights cases. With ever-growing reliance on the reserve forces, the nation cannot afford to suffer a “hollow Army” crisis through negligent handling of legitimate grievances against state employers made by reemploying Guard and Reserve servicemembers.

The Military Coalition recommends the Subcommittee review the lack of DoJ enforcement of USERRA and establish a requirement for that department to accept such cases. TMC further recommends that the Subcommittee establish a reporting requirement for the DoJ under Section 4323 to assess the effectiveness of the provision for state employee-reservists with legitimate USERRA claims against state employers that do not waive their sovereign immunity in such cases..

- Non-functioning role of the Office of Special Counsel. [38 USC Section 4324] Section 4324 provides for the enforcement of rights for Federal Executive Agencies. The statute authorizes the Secretary of Labor to refer a complaint for litigation under the USERRA before the Merit Systems Protection Board (MSPB). The Secretary “shall refer the complaint to the Office of Special Counsel established by section 1211 of title 5”. If the Special Counsel is satisfied that the servicemember’s rights under the USERRA have been violated, the Special Counsel is authorized to represent the servicemember before the Merit Systems Protection Board.

All well and good, but the Office of Special Counsel has never represented a member of the Guard or Reserve before the MSPB, and it apparently has neither the intention nor the resources to do so. Consequently, returning servicemembers who wish to file a claim under USERRA against their federal agency employer must hire their own counsel or represent themselves directly before the MSPB. It is our understanding that the MSPB has ruled on at least 100 cases brought before it by Guard and Reserve federal employees. But that record does not justify the indifference of the Office of Special Counsel, especially in cases where employees may not have the resources to pay for counsel or adequately represent themselves.

TMC urges the Subcommittee to strengthen the right to actual counsel for National Guard and Reserve servicemembers who wish to pursue a complaint against a Federal Executive Agency employer.

- Rules to Support Implementation of USERRA [38 USC Section 4331] This section permits the Secretary of Labor (DoL) in consultation with the Secretary of Defense to prescribe regulations to implement the statute. However, since 1994, DoL has never promulgated regulations to implement the USERRA. We believe that all stakeholders – reemploying reservists, employers, courts, attorneys, DoL staff, and others -- would benefit greatly

from the publication of regulations to formally implement the USERRA. The lengthy delay in issuing implementing regulations for the USERRA is unacceptable and should be remedied as quickly as possible.

It has also come to our attention that DoL / Veterans Employment and Training Service (VETS) has been reviewing a "USERRA Handbook" for a considerable period of time; it provides insight, guidance, and case histories on the application of USERRA in the workplace. Although the DoL / VETS website has a link to DoL's "A Non-Technical Resource Guide to the Uniformed Services Employment and Reemployment Rights Act (USERRA)" (March 2003), the Guide provides little help for interpreting the law. The Guide also does not describe the role of the Office of Special Counsel in representing reservist-employees of the Federal Executive Agencies.

TMC recommends that Congress amend the USERRA to require the Secretary of Labor to issue regulations implementing the USERRA by changing "may prescribe regulations" to "shall prescribe regulations" in Section 4331. TMC further recommends that DoL / VETS be provided the resources necessary to publish a "USERRA Handbook".

- USERRA and Family Medical Leave Act (FMLA) benefits. [29 USC Sections 2601-2654] In July 2002, the Department of Labor (DoL) issued a memorandum regarding protection of reemployed uniformed servicemembers rights to family and medical leave benefits under the provisions of the Family and Medical Leave Act of 1993 (FMLA) and the Uniformed Services Employment and Reemployment Rights Act of 1994. USERRA requires that returning veterans receive all benefits of employment that they would have obtained if they had been continuously employed, including eligibility for leave under the FMLA.

It is the sense of TMC that the linkage of FMLA benefits to USERRA is little known or understood in the Guard and Reserve community and by employers.

TMC recommends greater investment in resources to provide outreach to military reservists, families, and employers on the FMLA benefits for returning Guard and Reserve servicemembers.

- Upgrade USERRA Support and Outreach. The FY 2004 budget submission for DoL / VETS includes only a very modest increase in resources to support USERRA investigative and outreach activities. The Budget Request shows only a very modest increase of 200 new cases projected to be opened under the USERRA from FY 2003 to FY 2004. That hardly seems sufficient to handle the likely influx of claims arising from some of the nearly three-hundred thousand members of the Guard and Reserve who have been mobilized since 9/11, and the many thousands more who will be called up to replace them as rotations to Iraq and other campaigns are set.
- The total Budget request for USERRA activities for FY 2004 is only \$7,451,000, a paltry sum for the likely surge in USERRA workload that is sure to occur.

Returning reservists who are denied reemployment rights can wind up facing a second enemy when they get back home with no buddies by their side to help. Even the most well-intended employers may be tempted to deny certain rights of reemployment if they perceive that the government has neither the resources nor the intent to aggressively pursue reemployment rights claims.

The consequences for retention and future recruiting could be disastrous if the word gets out that the servicemember can't get her job back and must fight alone for months and years to win her claim for reemployment.

TMC, therefore, recommends that the Subcommittee authorize an outside review of the DoL / VETS and DoJ resource requirements for adequate USERRA compliance activities.

Finally, TMC wants to bring to the Subcommittee's attention the problems often faced by student reservists when they are called to serve the nation on active duty. Although student reservists, as students, are not "employees" of academic institutions, they face re-admission problems that mirror reemployment rights situations. These problems include students being treated as drop-outs when mobilized, being required to pay interest and penalties for failing to pay federal student loans, and denial of requests for student loan deferments, and incomplete or failing grades for coursework.

Members of this Congress have responded to their reservist-constituents' concerns by introducing a number of bills during this 108th Congress to provide better academic reinstatement protections for mobilized members of the Guard and Reserve. In fact, the House version of the National Defense Authorization Act for FY 2004 includes a provision that authorizes the Secretary of Education to make policy decisions that support reservists who lose academic standing, are penalized regarding deferment of their federal student loans, and related problems.

TMC believes that academic reinstatement rights should be guaranteed either under the USERRA or the Soldiers and Sailors Civil Relief Act, as Amended. We recommend that the Subcommittee work with the Total Force Personnel Subcommittee of the House Armed Services Committee to ensure that returning Guard and Reserve servicemembers are able to be fully re-instated in the academic or training program they were required to leave when activated.

The Military Coalition appreciates this opportunity to appear before the Veterans Benefits Subcommittee on the issue of improving the Uniformed Services Employment and Reemployment Rights Act. Your work on behalf of our nation's servicemembers and veterans is very important to them and their families and we appreciate your "stepping up" to do the right thing on their behalf.